TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 ~~1940~~ 1941

No. ~~781~~ 28

CLOVERLEAF BUTTER COMPANY, PETITIONER,

vs.

HAYGOOD PATTERSON, AS COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1941.

CERTIORARI GRANTED APRIL 7, 1941.

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[fol. 2] **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA**

No. Civ. 72

CLOVERLEAF BUTTER COMPANY, a Corporation, Plaintiff,

vs.

HAGOOD PATTERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et al., Defendants

BILL OF COMPLAINT—Filed June 28, 1940

To the Hon. C. B. Kennamer, Judge of the United States District Court for the Northern Division of the Middle District of Alabama, in Equity Sitting:

Cloverleaf Butter Company, a corporation, brings this its bill of complaint and respectfully shows unto your Honor as follows:

Plaintiff

1. Cloverleaf Butter Company is a corporation organized under the laws of the State of Alabama, and has its principal place of business and office in Jefferson County, Alabama.

Defendants

2. Hagood Patterson is a citizen of the State of Alabama. He is over 21 years of age, and resides in Montgomery, Alabama. He is Commissioner of Agriculture and Industries of the State of Alabama. His office and official residence is in the City of Montgomery, Alabama.

3. George H. Marsh is a citizen of the State of Alabama, and resides in the City of Montgomery, Alabama. He is over 21 years of age. He is Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, and has his official [fol. 3] residence and office in the City of Montgomery, Alabama.

Jurisdiction

4. This action arises under the Constitution of the United States of America, Article 1, Section 8, and Title 26, Chapter 713, United States Code Annotated, Sections 571, 572, 578, 579, 580, 582, and Title 26, Sections 990 and Section 995, Subchapter (b) of Chapter 9, and the regulations adopted pursuant thereto approved by Henry A. Wallace, Secretary of Agriculture, Wayne C. Taylor, Acting Secretary of the Treasury and Guy T. Helvering, Commissioner of Internal Revenue of the United States of America. Also Title 21, United States Code Annotated, Sections 71-93, and 103-105, inclusive, and Title 19, United States Code Annotated, Section 181. The matter in controversy exceeds, exclusive of costs, the sum of Three Thousand Dollars.

Complaint

5. About the 1st day of June, 1920, plaintiff started in the business of manufacturing renovated or process butter, as those terms are defined in Paragraph (c) of Section 990, Title 26, Subchapter B of the United States Code Annotated, under a license issued to the plaintiff by the United States of America, and since said time, plaintiff has been continually engaged in said business under a license from the United States of America, and has conformed to and complied with all of the statutes of the United States of America relating to the manufacture of process or renovated butter, and the regulations relating thereto adopted and promulgated pursuant to said statutes.

6. Plaintiff avers that in Section 995 of Chapter 9, Title 26, United States Code Annotated, it is provided:

[fol. 4] "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed or prepared for market and of the products thereof and materials going into the manufacture of the same. * * * The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 996 (c) and 997 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from

which it is made. And he shall also have the power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other states or in course of exportation or shipment he shall have power to confiscate the same."

7. Plaintiff avers that the Secretary of Agriculture has heretofore promulgated regulations relating to process or renovated butter, which were revised in April, 1936 and appear in a bulletin known as Regulations No. 9, issued by the United States Treasury Department, Bureau of Internal Revenue. Said regulations were further revised and made more specific on to-wit, the 24th day of December, 1936 by Henry A. Wallace, Secretary of Agriculture, all of which appears in a bulletin entitled "Regulations for Carrying into Effect the Process or Renovated Butter Act", and plaintiff attaches hereto a photostat copy of the aforesaid regulations for carrying into effect the Process or Renovated Butter Act, and marks the same Exhibit "A" and makes the same a part of this bill as if fully set out herein at this place.

[fol. 5] 8. Plaintiff avers that in the aforesaid regulations in Paragraph (d) of Article 130 on page 74 of Regulations No. 9, it is specifically provided:

"(d) *Deleterious products seizable.*—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated."

9. Plaintiff avers that when it started in the business of manufacturing renovated or process butter, as those terms are defined by Paragraph (c) of Section 990, Title 26, Subchapter (b) United States Code Annotated, pursuant to the aforesaid statutes of the United States and the regulations

authorized and promulgated, the Secretary of Agriculture had taken over the entire field of inspection of all factories and storehouses where process or renovated butter was manufactured, packed or prepared for market, and of the products thereof and materials going into the manufacture of the same, including the field of ascertaining and reporting from time to time the quantity and quality of process or renovated butter manufactured, and the character and condition of the material as soon as it was made, and the determination of whether or not materials used in the manufacture of process or renovated butter would be deleterious to health or unwholesome in the finished product. And plaintiff avers that the Secretary of Agriculture has occupied said field continuously and exclusively until the seizure of some raw materials, the property of the plaintiff hereinafter referred to.

[fol. 6] 10. Plaintiff avers that in the performance of the duties imposed upon him by the aforesaid statutes of the United States, and the aforesaid regulations adopted and promulgated pursuant thereto, the Secretary of Agriculture has made or caused the inspections required by law to be made from time to time by experts of the Department of Agriculture of the United States of America, both as to the raw material from which process or renovated butter is manufactured, and the finished product, as well as the storehouses and factories where process or renovated butter is manufactured, packed or prepared for market, including the plant operated by the plaintiff. Plaintiff avers that since it started in the business of manufacturing process or renovated butter on to-wit, June 1, 1920, its factories and storehouses where it manufactures, packs or prepares butter for market has been frequently inspected by the Secretary of Agriculture and that during said time the Secretary of Agriculture has made frequent inspections of all raw material which plaintiff uses in the manufacture of process or renovated butter, and he has also made frequent inspections of the finished product, and at no time has the Secretary of Agriculture ever determined that any materials used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product.

11. Plaintiff avers the raw material it purchases and uses in the manufacture of process or renovated butter, is com-

monly referred to as packing stock butter, and is purchased or acquired from small farmers and small producers of butter, and small country stores and rolling stores which obtain such butter from small farmers, or small producers of butter in exchange for cash, groceries or other commodities. These small farmers and small producers of butter, and small country stores and rolling stores are [fol. 7] located in the states of Georgia, North and South Carolina, Tennessee, Virginia, Mississippi and Alabama. Approximately 75% of such raw material originates without the State of Alabama and is transported to plaintiff in Birmingham, Alabama, in interstate commerce. The raw material originating in Alabama, is transported to the plaintiff in Birmingham, Alabama, in interstate commerce for the manufacture of process or renovated butter for shipment to persons, firms and corporations in interstate commerce without the State of Alabama. None of the raw materials originating within or without the State of Alabama has ever been sold, offered, exposed or kept for sale by the plaintiff in its then condition, but is acquired solely for the purpose of being manufactured into process or renovated butter, and all of said raw material enters into the stream of interstate commerce from the time it is acquired by the plaintiff until it is delivered, and remains in said stream until delivery of the finished product manufactured from said raw material is accepted by the purchaser of the said finished product.

12. Plaintiff further avers that all of the raw material used by the plaintiff in the manufacture of process or renovated butter whether originating inside or outside of the State of Alabama is delivered to plaintiff's plant in Birmingham, Alabama, in interstate commerce, and is there subjected to a process by which it is melted, clarified, pasteurized, cleansed and refined, and the butter fat drawn off or extracted, melted, clarified, pasteurized, cleansed and refined, and then mixed with pure milk or pure milk product, rechurned and manufactured into process or renovated butter to be sold in interstate commerce.

13. Plaintiff avers that the finished product it manufactures is recognized as an article of commerce by the United States of America, as well as the State of Alabama, as [fol. 8] appears in Section 71 of the Argicultural Code of the State of Alabama.

14. Plaintiff further avers that after the raw material it acquires in interstate commerce is subjected to the aforesaid process at its plant in Birmingham, Alabama, and is manufactured into the finished product, that approximately 90% of the said finished product is sold without the State of Alabama, and is transported from plaintiff's plant to destinations in states outside the State of Alabama in interstate commerce, and that approximately 10% of its finished product is offered for sale to the trade in the State of Alabama. Plaintiff further avers that the demand for the finished product exceeds the entire production possible with the available supply of raw material.

15. Plaintiff avers that it owns a modern, up-to-date plant in the City of Birmingham, which now has a value of to-wit, fifty thousand dollars, and plaintiff employs about 25 people in the daily operation of said plant, which is operated continuously unless interrupted by lack of raw material. Its factory is designated by the United States as "United States Factory No. 1, District of Alabama, Process Butter."

16. Plaintiff avers that when it started in the business of manufacturing process or renovated butter, about the 1st of June, 1920, its annual requirements of raw material amounted to approximately 100,000 pounds of packing stock butter per year, having a value of to-wit, ten thousand dollars; that its annual requirements for the manufacture of its process or renovated butter at the present time is approximately 2,000,000 pounds of packing stock butter, having a value of in excess of three hundred thousand dollars; that its business has grown and developed from the [fol. 9] aforesaid modest operation to its present magnitude under the strict supervision of the Secretary of Agriculture of the United States of America, and in conformity to the laws of the United States, and the rules and regulations relating to process or renovated butter made and promulgated thereto, and plaintiff avers that its said business is now reasonably worth in excess of two hundred thousand dollars, including the plant, physical equipment and goodwill.

17. Plaintiff avers that the demand for its finished product outside of the State of Alabama now exceeds its production possible with the available raw material.

18. Plaintiff avers that pursuant to Article 1, Section 8 of the Constitution of the United States, the Congress of the United States has entered and preempted the entire field in reference to the regulation and inspection of process of renovated butter in interstate commerce by the said Act of May 9, 1902, together with the sections of United States Code Annotated heretofore referred to codifying the same. And plaintiff further avers that the Secretary of Agriculture and the Commissioner of Internal Revenue, as authorized by said laws and pursuant thereto, have promulgated detailed regulations having the effect of laws for the control and inspection of process or renovated butter and the raw materials out of which same is made and the factories and plants connected therewith; said regulations having been promulgated from time to time and revised in 1936 and further amended in December 1936, and plaintiff avers that the United States Government has fully occupied and preempted the field of inspection, regulation and control of the manufacture of process or renovated butter in interstate commerce to the exclusion of the State of Alabama, its officers or agents or employees and such regulation occupies the entire field of inspection of the raw materials [fol. 10] going into the manufacture of process or renovated butter; the regulation and inspection of plants, machinery and equipment; and the operation thereof used in connection with the manufacture of the said butter and applies both to the raw material and the finished product and the plant. The enforcement of said Act of Congress has been committed to the Secretary of Agriculture and to the Commissioner of Internal Revenue of the United States and until within the last few months there has been no attempt on the part of the State of Alabama, its officers or agents, to invade said field or to inspect or suspend or seize any raw material used by the plaintiff in the manufacture of said process or renovated butter. The said duties imposed upon the Secretary of Agriculture and the Commissioner of Internal Revenue of the United States have been fully performed and discharged by them; and plaintiff avers that the said field has been and is now fully and exclusively occupied by the officers, agents or employees of the Secretary of Agriculture, as authorized by the Acts of the Congress of the United States since the plaintiff has been engaged in the manufacture of renovated or process butter; and the plaintiff expressly denies that anyone of

the defendants, or their officers, agents or employees, has any right, officially, or individually, or otherwise, to inspect or suspend or seize any of the said raw material held or used by plaintiff in or about the manufacture of renovated or process butter, or to interfere in any way whatsoever with the possession or transportation of said raw material or the manufacture of the finished product.

19. Plaintiff further avers that in the practical operation of its plant it is necessary to mix and store and plaintiff does mix and store the raw material which originates without the State of Alabama and is delivered to the plaintiff in Birmingham, Alabama, with raw materials which origi- [fol. 11] nates in the State of Alabama; and after said mixture takes place same is indistinguishable and all is used or placed in cold storage for use as raw material out of which said process butter is manufactured by the plaintiff. When the finished product is produced, it is impossible to determine what part of the finished product is composed of raw materials which originated without or within the State of Alabama. And plaintiff further avers that it does not manufacture a finished product for exclusive sale and delivery in interstate commerce different from its finished product which it offers for sale within the State of Alabama, but that its finished product offered for sale in the State of Alabama, and to persons, firms and corporations without the State of Alabama, is all of the same kind, and comes from the aforesaid source; though 90% of said finished product is, and for many years has been, sold without the state and 75% of the raw material has been bought without the state.

20. Plaintiff avers that it is advised and informed by counsel and believes, and upon such advice, information and belief avers that the Congress of the United States of America, by special and specific laws duly enacted, above referred to, and the resignated and duly authorized departments of the United States * * * have by * * * regulations adopted and promulgated thereunder, entered the field of the regulation and inspection of the manufacture and sale of process or renovated butter and of the raw material entering into the manufacture thereof, and the finished product and all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market and of the products thereof and mate-

rials going into the manufacture of the same, and the field of determining whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, and that notwithstanding the exclusive occupancy of the [fol. 12] said field by the United States of America through its Secretary of Agriculture and other duly authorized agents, pursuant to the aforesaid acts of Congress, and the regulations promulgated pursuant thereto, the defendant Hagood Patterson as Commissioner of Agriculture and Industries of the State of Alabama, and the defendant George H. Marsh as Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, have construed the laws of the State of Alabama to authorize and warrant them to enter the premises of the plaintiff in Birmingham, Alabama, where it receives its said raw material or packing stock butter acquired by the plaintiff in interstate commerce for the purpose of manufacturing process or renovated butter, and to seize, suspend or otherwise deprive plaintiff of the right to use such raw material or packing stock butter, and to stop and search trucks moving in interstate commerce hauling said raw material from places without the State of Alabama to plaintiff's place of business in Birmingham, Alabama, and to seize, suspend or otherwise deprive plaintiff the right to use the said raw material or packing stock butter being so transported in interstate commerce and to authorize and warrant the defendants in stopping and searching trucks transporting the aforesaid raw material from points in Alabama to plaintiff's plant in Birmingham, Alabama, to be used in the manufacture of process or renovated butter as aforesaid, and acting under some supposed or claimed authority of the statutes of the State of Alabama enacted long after the United States law above referred to, the defendants have interfered with the plaintiff's business, have impeded the operation of plaintiff's plant and have prevented the plaintiff from using a large portion of the raw material entering into the manufacture of its finished product, and are threatening and intended to continue to do so, and have undertaken to inspect the raw material both in the plant and on the way to the plant and in the hands of small [fol. 13] merchants or producers or truck operators convey-

ing the same and attempted to suspend quantities of said raw material from time to time and prevent same from being used by the plaintiff in the manufacture of its finished product and have attempted to determine for themselves what may be used as raw material in the manufacture of said process butter and have invaded the field of interstate commerce and that portion of the field in connection with the operation of plaintiff's business which has been fully preempted and exclusively occupied by the United States Government for a long number of years and is at present so occupied by the United States Government and said defendants are threatening to continue to harrass and impede, regulate, direct and control the operation of plaintiff's said business and have attempted to inspect plaintiff's factory or storehouse where process or renovated butter is manufactured, packed and prepared for market and the products of the same and the materials going into the manufacture of said process butter over the protest and objection of plaintiff; and plaintiff avers that said conduct on the part of the said defendant has placed a great burden upon the plaintiff's business in interstate commerce, has unduly hampered and interfered with the same, has wrongfully caused the plaintiff great financial loss and a continuance of the same would result in great diminution of plaintiff's business or production of the same. And the plaintiff avers that defendant has interfered with and impeded plaintiff's business and has placed an undue burden upon plaintiff's business in interstate commerce, has wrongfully invaded a field which is now and has heretofore fully preempted, occupied exclusively by the United States Government under the said Act of Congress and the wrongful conduct of the said defendant in and about the same has been in the manner following, to-wit:

[fol. 14] (a). Between, to-wit, the 17th day of April, 1939, and the 22nd day of June, 1940, defendants on 16 separate occasions, seized in Birmingham, Alabama, a total of 20924 pounds of plaintiff's raw material or packing stock butter which originated in whole or in part in states of the United States outside of the State of Alabama and which had been so delivered to the plaintiff's plant in Birmingham, Alabama, as raw material and which was not being sold, offered or exposed for sale, or attempted for sale in its then condition but was being held by the plaintiff solely

and exclusively for the purpose of using the same as raw material out of which to manufacture process or renovated butter in the usual course of plaintiff's business. The said packing stock butter so seized was of the value in excess of Three Thousand Dollars and the plaintiff has been and is now deprived of the use of same and has been prevented from using the said raw material in the manufacture of its finished product during said period of time and the plaintiff has been subjected to great expense, inconvenience, delay in or about loss of the use of said raw material and the cost of keeping and storing the same. The dates and quantity seized on each occasion are as follows:

April 17, 1939	241 pounds
April 29, 1939	981 pounds
May 13, 1939	1038 pounds
May 25, 1939	300 pounds
June 3, 1939	858 pounds
June 17, 1939	207 pounds
June 10, 1939	4238 pounds
June 21, 1939	3991 pounds
June 22, 1939	736 pounds
June 23, 1939	1527 pounds
June 23, 1939	407 pounds
June 23, 1939	400 pounds
July 29, 1939	2147 pounds
[fol. 15] October 5, 1939	511 pounds
June 22, 1940	1547 pounds
June 22, 1940	1795 pounds

21. Plaintiff avers on, to-wit, the 21st day of June, 1940, in making the last seizure, above referred to, the defendants stopped a truck moving in interstate commerce from the State of Georgia to the State of Alabama transporting said raw material known as packing stock butter from the State of Georgia to the plaintiff in Birmingham, Alabama. Plaintiff avers that as a result of the seizure of said raw materials by defendants, it has been denied the use thereof; the seizure and detention of said raw material has caused great financial loss to the plaintiff in that plaintiff is required to pay the storage on the same and is denied the use of such raw materials that plaintiff sorely needs in the conduct of its business, and has caused plaintiff's plant to remain idle from time to time for the lack of sufficient

raw material to keep the same operating; that said action of the defendants demoralizes plaintiff's employees who are employed to operate said plant, and is calculated to and does interfere with the sale of its finished product in interstate commerce. Plaintiff further avers that the defendants have contacted the sources of raw material in Alabama from which plaintiff obtains raw material in Alabama to renovate and process butter to be shipped to persons, firms and corporations in various states of the United States to be shipped in interstate commerce to persons, firms and corporations in various states of the United States without the State of Alabama and have terrorized, frightened and intimidated said sources by statements to the effect that they would lose the value of their raw material if they undertook to furnish the same to plaintiff, or would be put to great trouble, annoyance, expense and inconvenience in and above obtaining compensation for the same, all in an effort to destroy plaintiff's [fol. 16] source of supply of raw material in Alabama for the manufacture of its finished product for transportation and sale in interstate commerce.

22. Plaintiff avers that the defendants will, unless enjoined and restrained by an appropriate order of this Court, continue to inspect all raw material used by the plaintiff in the manufacture of process butter, to-wit, said packing stock butter, which is not kept for sale, exposed for sale or offered for sale by the plaintiff, and defendants will continue to determine whether or not said raw material used by the plaintiff in the manufacture of process or renovated butter for sale and delivery in interstate commerce, will be deleterious to health or unwholesome in the finished product, all of which will subject the plaintiff to great expense, annoyance, and inconvenience in and about its efforts to obtain said raw material and market its finished product in interstate commerce, and which will cause plaintiff great monetary loss, resulting from shutdowns of its plant, the loss of orders and profits on orders that it now has and will obtain, and plaintiff avers that the value of its right to conduct its said business free from the wrongful restrictions, interferences and inspections, searches and seizures of defendants is in value greatly in excess of the value of Five Thousand Dollars.

23. Plaintiff is advised by counsel, informed and believes, and upon such advice, information and belief avers that all of the aforesaid seizures and detention of its aforesaid raw material on the aforesaid days and dates, the stoppage of said truck, above referred to, and all of the inspections made by the defendants, and all of the interferences with plaintiff's business by the defendants, herein complained of, have been made by the defendants as officers or agents of the State of Alabama under the alleged color [fol. 17] or pretended authority claimed by them to be in the laws of the State of Alabama, Agricultural Code of 1927, and amendments relating thereto, and that the particular articles of sections of said Agricultural Code so relied on by the defendants are Sections 37, 71, 72, 218, 219 and Section 217 as amended by an act approved September 14, 1935, entitled "An Act to Amend the Code of Laws known as the Agricultural Code of Alabama, 1927", etc., which said act is found on pages 1102, 1103, 1104 and 1105 of the printed Acts of the Legislature of Alabama held at its regular session in the year 1935. The said sections referred to being in words and figures as follows:

"37. Possession: Sale and Delivery of Prohibited Articles.—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article."

"71. Renovated Butter.—No person shall sell in this State any butter that is produced by taking original packing stock butter, or other butter, or both, and melting the same so that the butter fat can be drawn off or extracted, then mixing the said butter fat with skimmed milk, or milk, or cream, or other milk product, and re-churning or re-working the said mixture, or that produced by any process that is commonly known as boiled, process or renovated butter, unless the words "renovated butter" shall be plainly branded with Gothic or bold faced letters at least three-fourths of an inch in height on the top and sides of each tub, or box, or pail, or other kind of case, or package, or on the wrapper of prints or rolls in which it is put up. If such butter is exposed for sale uncovered or not in a case or package, a placard containing the labels so printed

[fol. 18] shall be attached to the mass of butter in such manner as to easily be seen and read by the purchaser. The branding or marking of all packages shall be in the English language, and in a conspicuous place so as to be easily seen and read by the purchaser."

"72. Commissioner Charged With Enforcement.—The Commissioner and his duly authorized agents shall be charged with the proper enforcement of all the provisions of this Article."

"218. Proceeding to Condemn Seized Article.—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated, misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found, and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the writ; such Court shall hear and decide [fol. 19] whether the allegations of the complaint are true, and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed

by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised [fol. 20] may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not

be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this Article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof."

"219. Report of Violations to Solicitor. If it shall appear from examination or analysis of fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seed, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any articles of food or drugs that any of the provisions of this Article have been violated, the Commissioner shall certify or cause to be certified the facts to the county or State solicitor, with a copy of the results of the analysis or examination, and [fol. 21] said county or State solicitor upon receipt of this information shall cause appropriate proceedings to be instituted in the proper Court, for the imposition of fines and penalties herein provided."

"Section 3. That Section 217 of Article Twenty-three of the 'Agricultural Code of Alabama', of 1927, be and the same is hereby amended so as to read as follows: Section 217. Suspension of Sale of Article.—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law. If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized

to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeeding Sections of this Article. Provided in case the owner of such product or articles denies by written notice to the [fol. 22] Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, trapported or otherwise disposed of by and in compliance with written order by the Commissioner."

Sec. 3, pp. 1103 and 1104 of the Acts of 1935.

24. Plaintiff is advised by counsel, informed and believes, and on such advice, information and belief avers that neither the aforesaid statutes or any other valid statute of the State of Alabama authorizes or justifies, when properly construed, the action of the defendants herein complained of, or interference with the plaintiff's business, herein complained of, or their attempt to determine whether or not material used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, or their seizure on said occasions of said raw material above described and referred to.

25. Plaintiff is advised by counsel informed and believes, and on such information and belief, avers that each of the acts of the defendant, herein complained of, and their at-

tempt to determine whether or not the raw material used [fol. 23] by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, as well as their seizure of said raw material on the days and dates above referred to, as well as their contemplated future seizure of raw material so to be used by the plaintiff, is wholly outside of and beyond and without the statutes of the State of Alabama when properly construed, inasmuch as the Congress of the United States has entered and preempted the field of determining whether or not material used in the manufactured of process or renovated butter will be deleterious to health or unwholesome in the finished product, as well as the field of making a rigid sanitary inspection at such times as the Secretary of Agriculture may deem proper or necessary of all factories and warehouses where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and material going into the manufacture of the same.

Premises considered, the plaintiff prays that Hagood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, in his official capacity as such officer, and George H. Marsh, as Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, in his official capacity as such official, each be made parties defendant to this bill of complaint by appropriate legal process; that this Court will order said defendants to appear before it on such day and date as the Court may fix, and at said time after a hearing as prescribed by law, issue a preliminary injunction to the said Hagood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, and the said George H. Marsh, as Director of the Division of Agricultural Chemistry in the Department of Agriculture and In- [fol. 24] dustries of the State of Alabama, enjoining and restraining them and each of them and their officers, agents and employees, from:

(1) Determining or attempting to determine whether or not raw material known as packing stock butter, used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, and determine or attempting to determine whether or not packing stock butter in plaintiff's possession

to be used exclusively in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product.

(2) Inspecting packing stock butter or any other raw material used in the manufacture of process or renovated butter in plaintiff's possession or under its control which is not held by the plaintiff for sale, offered for sale or exposed for sale in its then condition.

(3) Inspecting plaintiff's factory and storehouse where process or renovated butter is manufactured, packed or prepared for market, or the products thereof or the materials going into the manufacture of the same.

(4) Seizing or attempting to seize, defaining or attempting to detain, suspending or attempting to suspend, or otherwise interfering with the transportation, storage, possession, purchase or use of packing stock butter used by the plaintiff in the manufacture of process or renovated butter, or in its possession or under its control for such purpose exclusively.

(5) Seizing or attempting to seize, or otherwise interfere with plaintiff's plant or any truck or other vehicle operated by the plaintiff for the transportation or storage [fol. 25] of packing stock butter in plaintiff's possession, or under its control to be used exclusively in the manufacture of process or renovated butter.

(6) Seizing or searching, or attempting to seize or search, inspecting or attempting to inspect, detaining or attempting to detain, or otherwise interfering with any packing stock butter, the property of the plaintiff, held by it for the exclusive purpose of manufacturing process of renovated butter, which is kept in any warehouse, cold storage refrigerator place, or other place of business by direction of or under arrangements with the plaintiff.

(7) Informing, suggesting, insinuating, or otherwise undertaking to create in the mind of producers of packing stock butter, the impression that they will have difficulty in obtaining compensation for any packing stock butter sold plaintiff, or attempting to create the impression in the minds of such persons that the plaintiff's business is improperly or illegally conducted.

And plaintiff prays that upon final hearing said preliminary injunction be made perpetual, and plaintiff submits

itself of the jurisdiction of the Court, offers to do equity, and if it has not prayed for the proper relief, it now prays for such other, further, general, special or appropriate relief as in equity it may be entitled to, for which it will as in duty bound ever pray.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith, Attorneys for Plaintiff.

[fol. 26] *Duly sworn to by James M. Kidd. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ORDER FOR HEARING—Filed June 28, 1940

On Presentation and Consideration of the foregoing verified bill of complaint, it is Ordered that proper process in the manner and form prescribed by law issue to each of the defendants named in the foregoing bill of complaint; it is further Ordered that the application for preliminary injunction prayed for in the bill of complaint be and the same is hereby set for hearing before the undersigned in Montgomery, Alabama, on the 12th day of July, 1940, at 10 A. M. o'clock, in the United States District Court Room in said City. It is further Ordered that a copy of this order, together with a copy of the bill of complaint be served instanter upon each of the defendants and due return made according to law.

[fol. 27] Done and Ordered at Montgomery, Alabama, on this the 28th day of June, 1940.

C. B. Kennamer, Judge, United States District Court, Northern Division of the Middle District of Alabama.

EXHIBIT "A" TO BILL OF COMPLAINT

B. D. I. Order No. 1—Revised. Issued December 24, 1936.

United States Department of Agriculture,
Bureau of Dairy Industry.

Regulations for Carrying Into Effect the Process or Renovated Butter Act.

Introduction

Under authority conferred upon the Secretary of Agriculture by the act of Congress approved May 9, 1902, en-

titled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886'" (32 Stat. 193-197; U. S. C., title 26, sec. 990-997); and by the act of Congress approved August 10, 1912, en- [fol. 28] titled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913" (37 Stat. 273); the following regulations are made and are hereby promulgated, which for purposes of identification are designated B. D. I. Order No. 1—Revised, superseding S. R. A. 1—Bureau Dairying, issued April 1925; and B. D. Order 1, issued February 14, 1925; which are hereby revoked.

Henry A. Wallace, Secretary of Agriculture.

Washington, D. C., December 24, 1936.

Regulation 1.—Short Title of Act

For the purpose of these regulations the act entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An Act Defining Butter', also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886", approved May 9, 1902 (32 Stat. 193-199; U. S. C., title 26, sec. 990-997, as amended by the act of August 10, 1912 (37 Stat. 273, U. S. C., title 26, sec. 997 (c)), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913", shall be known and referred to as the Process or Renovated Butter Act. The Chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary, with the administration of these regulations.

[fol. 29] Regulation 2.—Definitions

For the purpose of these regulations the following words, phrases, names, and terms shall be construed, respectively, to mean:

Section 1. The Meat Inspection Act.—The act of June 30, 1906, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven" (34 Stat. 674-679) as re-enacted by act of March 4, 1907 (34 Stat. 1260-1265; U. S. C., title 21, secs. 71 to 94), entitled "An act making appropriations for t' Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight", the sanitary provisions of which are made applicable to renovated-butter factories by act of Aug. 10, 1912 (37 State. 273; U. S. C., titles 26, sec. 997 (c)), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913."

Sec. 2. Department.—The United States Department of Agriculture.

Sec. 3. Bureau.—The Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 4. Chief of Bureau.—The administrative head of the Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 5. Inspector.—Any Department officer or employee authorized to perform any duties in connection with the administration of these regulations.

Sec. 6. Person.—Natural persons, individuals, firms, partnerships, corporations, companies, societies, and associa-[fol. 30] tions, and agent, broker, officer, employee, or member thereof. This term shall import both the plural and the singular as the case may be.

Sec. 7. Butter.—The food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Sec. 8. Par. 1. Process or renovated butter.—Butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting adulterated butter as defined in section 4 of the act of May 9, 1902 (32 Stat. 195).

Par. 2. Process or renovated butter must contain at least 80 per cent by weight of milk fat.

Par. 3. The term "process butter" and "renovated butter" are used synonymously and it is immaterial whether a manufacturer designates the product "process butter" or "renovated butter."

Regulation 3.—Sanitation and Sanitary Inspection of Process or Renovated Butter Factories

Section 1. For the purpose of effectively administering the Process or Renovated Butter Act, rigid sanitary inspections will be made at such times and as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market.

Sec. 2. Inspectors shall have access at all times by day or night to every part of any process or renovated butter factory or storehouse.

[fol. 31] Sec. 3. Process or renovated butter factories or storehouses where process or renovated butter is manufactured, packed, prepared, or handled shall be maintained in a sanitary condition, and to this end the requirements of sections 4 to 12 of this regulation shall be complied with.

Sec. 4. Factories where process or renovated butter is manufactured, packed, or prepared for market shall be suitably lighted, screened, and ventilated in order that sanitary conditions may be maintained. Such factories shall be supplied with proper and sufficient drainage, having proper traps or other approved sewer connections. Rooms shall be kept reasonably free from steam and other vapors by heating or proper ventilation, and all work in such factories shall be performed in a sanitary manner.

Sec. 5. All floors, ceilings, walls, pillars, partitions, platforms, stairways, etc., shall be kept in a sanitary condition and when necessary shall be scraped, washed, painted, or otherwise treated as required. Where floors or other parts of the building, or tables or other parts of the equipment, are so old or in such poor condition that they cannot readily be made sanitary, they shall be removed and replaced with suitable material. Walks, platforms, and approaches leading into factories shall be kept clean.

Sec. 6. All churns, melting tanks, workers, cans, vats, blowing tanks, settling tanks, trucks, trays and other receptables, chutes, platforms, racks, tables, and all utensils, machinery, and other equipment used in preparing, moving, cutting, chopping, and otherwise handling the materials used in the manufacture of process or renovated butter, and in all processes of manufacturing of process or renovated butter or its preparation for market, shall be kept in a sanitary condition.

[fol. 32] Sec. 7. All factories in which milk, cream, or mixtures containing milk or cream are pumped or conducted through pipes shall be equipped with sanitary pumps, pipes, and fittings. Pumps shall be so constructed that all parts coming in contact with milk, cream, or mixtures containing milk or cream shall be made of non-corrosive metal, or shall be suitably nickeled, tinned, or coated with other approved metal, and such part shall be accessible for cleaning. Pipes shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and fittings shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and shall be of such design that no pockets or recesses occur on the inside between the pipes and fittings: Provided, however, That open conductors having smooth outer and inner surfaces coated with nickel, tin, or other approved metal may be used in place of pipe. All pumps, pipes, fittings, and conductors shall be kept in a sanitary condition.

Sec. 8. Managers of process or renovated butter factories shall require employees to be cleanly. Aprons, smocks, and other outer clothing worn by employees who handle or in any way come in contact with the process or renovated butter or any ingredient entering into the manufacture of same shall be of material that can be made sanitary by washing, and only clean garments shall be worn. All persons who handle process or renovated butter or any material entering into the manufacture of same shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots and shoes.

Sec. 9. No person affected with tuberculosis or other communicable disease shall be employed in any factory where process or renovated butter is manufactured, and any em- [fol. 33] ployees who may be suspected of being so affected

shall be reported by the inspector to the manager of the factory and to the Chief of Bureau.

Sec. 10. All water closets, toilet rooms, and dressing rooms shall be entirely separated from the compartments in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled; and where such rooms open into compartments in which process or renovated butter is handled they shall be provided with properly ventilated vestibules and automatically closing doors. They shall be conveniently located, sufficient in number, ample in size, and fitted with modern lavatory accommodations, including toilet paper, soap, running hot and cold water, etc., and shall be properly lighted, suitably ventilated, and kept clean and sanitary.

Sec. 11. The factory in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled shall be kept free from odors coming from poultry rooms, egg rooms, toilet rooms, catch basins, or any other objectionable source, and shall be kept free from flies and other vermin; and all rooms or compartments shall be provided with cuspidors so designed as to prevent them from being upset, and made of such material and construction as to be readily disinfected, and employees who expectorate shall be required to use them.

Regulation 4.—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured.

Section 1. Rigid sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.

[fol. 34] Sec. 2. Due care must be taken to prevent process or renovated butter, in any stage of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter.

Sec. 3. Only good, clean, and wholesome water and ice shall be used in the preparation and manufacture of process or renovated butter and, whenever there is any doubt re-

garding the purity of the water supply, the facts shall be reported to the Chief of Bureau.

Sec. 4. Air used in blowing or aerating the oil during the process of manufacture shall be pure and clean, and shall be taken from the outside of the building; and in order to prevent the use of air which is contaminated with dust, smoke, objectionable odors, etc., some approved method of purification, such as washing or filtering through cotton, shall be provided.

Sec. 5. In manufacturing process or renovated butter all cream, milk or skim milk used must be pasteurized.

Sec. 6. All milk, skim milk, dried milk, dried skim milk, cream, and analogous substances used in the making of process or renovated butter shall be kept, stored, and handled in a sanitary manner in accordance with accepted dairy practices.

Sec. 7. All other materials including salt and butter color entering into the manufacture of process or renovated butter shall also be kept, stored, and handled in a sanitary manner.

[fol. 35] Sec. 8. All cartons, parchment wrappers, liners, packages, tubs, cans, tins, or other containers used for packaging process or renovated butter shall be stored, kept, and handled in a sanitary manner.

Regulation 5.—The Marking, Labeling and Branding of Process or Renovated Butter.

Section 1. (a) Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State, and the net weight, in the following manner:

Process Butter

Factory No. 2, 2d Dist. New York

Net Weight, 60 lbs.

(b) The legend "Process Butter" or "Renovated Butter" shall be in bold-face gothic letters not less than three-quarters of an inch and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

Sec. 2. The wrappers, cartons, or other containers in which prints or rolls are placed shall be branded with the legend "Process Butter" or "Renovated Butter" in boldface gothic letters, not less than three-eighths of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of the wrapper or container on which the legend is placed.

Sec. 3. Each package must show the manufacturer's name and address or the factory number, district, and State, and [fol. 36] bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the act of Congress of March 4, 1923.

Sec. 4. The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter" in plain gothic letters not less than half an inch square, and impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

Sec. 5. With the exception of shipping marks, any marks, brands, or labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

Sec. 6. Approved copies of all marks, brands, or labels shall be retained at the manufacturer's registered place of business, available for inspection by an inspector.

Sec. 7. Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed is punishable by a fine of not less than $50 nor more than $500 or by imprisonment for not less than 1 month nor more than 6 months, or both. Every person who removes any such brands from any packages of process or renovated butter is punishable by a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both, as provided in section 4, act of March 3, 1891, made applicable by section 5, act of May 9, 1902.

[fol. 37] Sec. 8. Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of Columbia, is prohibited. That for the purposes of the Food and Drugs Act an article shall also be deemed to be misbranded in the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name of, another article;

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package;

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; or

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Sec. 9. Inspectors of the Department of Agriculture, appointed for the purpose by the Secretary of Agriculture, are authorized to enter all factories and storehouses where [fol. 38] process or renovated butter is manufactured, packed, or prepared for market for the purpose of examination or inspection authorized by this act.

Sec. 10. Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Chief of Bureau on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or renovated butter produced. The sanitary provisions of the Meat Inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See act of Aug. 10, 1912 (37 Stat., 273).)

Sec. 11. Process or renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance shall be deemed adulterated under the Food and Drugs Act.

Sec. 12. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof.

Sec. 13. Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter", in boldface gothic letters not less than an inch {fol. 39} square, and the words "For Export Only" on the line beneath, in similar letters not less than three-eighths of an inch square.

Sec. 14. Process or renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

(The foregoing secs. 1 to 14, have been promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and the Secretary of Agriculture.)

Sec. 15. All marks, brands, or labels, within the meaning of these regulations shall include printed, lithographed, or embossed labels, stickers, seals, wrappers, and receptacles.

Sec. 16. Marks, brands, or labels to be affixed to process of renovated butter intended for export shall in all cases be printed in the English language, but they may also be literally translated into foreign languages.

Sec. 17. No mark, brand, stencil, sticker, label, or seal to be affixed to any tin, carton, wrapper, or other container in which process or renovated butter is placed shall be

used until it is approved in its final form by the Chief of Bureau. Triplicates of new trade labels in the form of sketches, proofs, or photographic copies shall be transmitted direct or through inspectors to the Chief of Bureau for approval, and finished trade labels, cartons, or wrappers shall not be prepared in advance of such approval of sketches. After such labels, cartons, or wrappers have [fol. 40] been printed, lithographed, or embossed in accordance with the approved sketches or proofs three each of such cartons, labels or wrappers shall be submitted direct or through the inspectors for final approval and filing. Copies of approved labels, cartons, or wrappers shall be kept on file and available for examination by inspectors upon request.

Sec. 18. Trade labels which bear any false or deceptive names shall not be used.

Regulation 6.—Reports

Section 1. Each process or renovated butter factory shall furnish to authorized inspectors accurate information as to all matters required in making their reports.

Regulation 7.—Process or Renovated Butter Intended for or in Course of Interstate Commerce or for Export

Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

Sec. 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

[fol. 41] Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or un-

wholesome, and such butter is intended for exportation or shipment into other States, or is in the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes.

Sec. 5. Any butter suspected of being process or renovated, or adulterated, wherever found will be sampled as herein provided. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis, together with a statement outlining the circumstances of the collection of sample.

Sec. 6. All process or renovated butter intended for exportation or in the course of exportation must be marked as provided in these regulations.

Sec. 7. All process or renovated butter consigned to a foreign country must be inspected and duly certified before delivery to any vessel, carrier, or transportation company. Officers and agents of vessels and of transportation companies transporting merchandise consigned to foreign countries shall not accept process or renovated butter for transportation and export unless accompanied by an official inspection certificate issued pursuant to these regulations, properly dated and countersigned by an inspector. No vessel having on board any process or renovated butter for [fol. 42] exportation from any port of the United States will be cleared until the owner or shipper shall obtain an inspection certificate as required by these regulations, attesting to the purity, legal composition, and suitability for export of such process of renovated butter.

Sec. 8. Owners or shippers of process or renovated butter intended for export shall apply for inspection in writing to the Chief of Bureau. The said application shall state the location or place of business of the owner or shipper and the usual place or places where the process or renovated butter may be inspected, the place or places from which it is directly transported to the exporting vessel or transportation company, and the probable frequency of exports.

Sec. 9. The Chief of Bureau shall, upon receipt of such application, designate an inspector for the service required.

Sec. 10. The owner or shipper will notify the inspector of every export shipment to be made by him, at least 12 hours in advance, and shall briefly describe the location, form of package, and quantity of process or renovated butter to be inspected. The inspector will not be required to make inspections at two or more places distantly removed from one another if the materials are to be included in one shipment, but the inspection of an entire shipment may be made at the pier or place of loading for export.

Sec. 11. Inspections of process or renovated butter for export may be made at the place of manufacture and such inspections may also be made at the place of exportation, if inspection has not previously been made, or, in the opinion of the inspector, a reinspection is necessary. The [fol. 43] certificate for export will ordinarily be given by the inspector at the factory or at the place where the customs papers for export are prepared.

Sec. 12. The inspector will examine the merchandise specified with the least possible delay. And it will be the duty of inspectors to examine any process or renovated butter for export, upon the application, formal or informal, of transportation companies or their agents, or any such process or renovated butter about to be loaded for export, whether or not notice thereof has been received.

Sec. 13. Inspectors may make such examination of the process or renovated butter for export in such detail as in their judgment is deemed necessary to show that such butter complies with the law and the regulations. They may take samples of the same and detain the shipment, if deemed necessary, until chemical tests of samples are made. The presence, intact and properly affixed thereon, of the stamps, marks, and labels on a lot of process or renovated butter offered for export from a registered factory or factories may be accepted by an inspector as evidence of purity and of manufacture in accordance with law and these regulations, and the prescribed export certificate may then be executed by the inspector. Additional marks or labels may, however, be required by the inspector for the more complete identification of the process or renovated butter to be exported.

Sec. 14. The inspector shall complete, countersign, and issue a certificate of export. Such certificate shall be dated,

shall show the names of the exporter and consignee, and shall describe the lot of process or renovated butter to which it applies. Such description shall include the State, revenue district, and factory number of every factory represented in the lot, and the number of packages from each [fol. 44] factory, their respective weights and the shipping marks. Such certificate shall state the process or renovated butter in question is the product of a registered factory, of legal composition, and suitable for export. Certificates shall be numbered serially and rendered in triplicate.

Sec. 15. Only one certificate shall be issued for each consignment unless otherwise directed by the Chief of Bureau.

Sec. 16. The original certificate shall be delivered to the shipper and shall be used only for the purpose of effecting the transportation and delivery of the consignment.

Sec. 17. The duplicate of the certificate shall be delivered to the shipper and by him to the agent of the railroad or other carrier which transports the consignment from the United States otherwise than by water, or to the chief officer of the vessel on which the export shipment is made and without which no clearance shall be given to any vessel having aboard any process or renovated butter and shall be used only by these agencies and for the purpose of effecting the transportation of the consignment certified. The chief officer of the vessel shall file such duplicate with the customs officer at the time of filing the master's manifest or the supplemental manifest.

Sec. 18. The triplicate of the certificate shall be retained by the inspector issuing the same.

Sec. 19. Under no circumstances shall the original or the triplicate of any certificate be used for the purpose for which it is prescribed by paragraph 17 hereof that the duplicate shall be used.

[fol. 45] Sec. 20. No person operating any steam or sailing vessel, and no railroad or other carrier, shall receive for transportation to any foreign country any process or renovated butter, except ship stores and small quantities exclusively for the personal use of the consignee and not for sale or distribution, unless and until a certificate of inspec-

tion covering the same has been issued and delivered as provided in these regulations.

Sec. 21. All special requirements, if any, of foreign countries in regard to export certificates for process or renovated butter shall be complied with in respect to all certificates issued, provided such requirements are not in violation of the laws of this country or the rules and regulations promulgated under such laws.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT—Filed July 12, 1940

The defendants, separately and severally, move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction because there is no diversity of citizenship and because no substantial Federal question is presented thereby.

3. To dismiss the action on the ground that at least five days' notice of the hearing on application for interlocutory [fol. 46] injunction has not been given to the Governor of the State of Alabama and to the Attorney General of the State of Alabama, as is provided by Section 266 of the Judicial Code, as amended, (U. S. C. A. Title 28, Section 380).

Thos. S. Lawson, Attorney General; C. L. Rowe, Assistant Attorney General, Attorneys for the Defendants. Address: State Capitol, Montgomery, Ala.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed July 12, 1940

To Horace C. Wilkinson, one of the Attorneys for the Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United

States Court House in the City and County of Montgomery on the 12th day of July, 1940, at 10 o'clock A. M.

C. L. Rowe, Assistant Attorney General, of Counsel for the Defendants; Address: State Capitol, Montgomery, Alabama.

[fol. 47] IN UNITED STATES DISTRICT COURT

DECREE ON MOTION TO DISMISS—Filed July 18, 1940

This cause coming on to be heard was submitted for decree upon the motion of the defendants to dismiss the action, and same being heard, understood and considered by the Court, the Court is of the opinion that the motion to dismiss should be overruled.

It is therefore Ordered, Adjudged and Decreed by the Court that the motion of the defendants to dismiss the action on the grounds stated in the motion be, and the same is hereby, overruled.

And this cause coming on to be further heard, was submitted for decree upon the motion of the plaintiff to strike certain language in the answer, set out in the motion on file, and same being heard, understood, and considered by the Court, the Court is of the opinion that the motion of the plaintiff to strike certain language in the answer should be overruled.

It is therefore Ordered, Adjudged and Decreed by the Court that the motion filed by the plaintiff to strike certain language of the answer in a number of the paragraphs of the answer, be, and the same, and each ground thereof, is overruled and denied.

The defendant is allowed an exception to the ruling of the Court overruling and denying the defendant's motion to dismiss the Bill.

The plaintiff is allowed an exception to the ruling of the Court in overruling and denying plaintiff's motion to strike certain language of the answer filed by the defendant.

[fol. 48] This cause will be further heard on the bill of complaint, the answer, and the proof submitted, on Thursday, July 25th, 1940, at ten o'clock A. M., daylight savings time, in the United States District Court Room, at Montgomery, Alabama.

This 18th day of July, 1940.

C. B. Kennamer, United States District Judge.

In United States District Court

Stipulation of Facts—Filed July 23, 1940

The parties to this cause stipulate and agree that the legal questions in dispute between the parties are:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said [fol. 49] Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean

"procured, transported, handled, or sold as alleged in the complaint", as the context may indicate.

This July 23, 1940.

Horace C. Wilkinson, Erle Pet[illegible], Victor H. Smith, Attorneys for Plaintiff. Thos. S. Lawson, Attorney General; C. L. Rowe, Assistant Attorney General, Attorneys for Defendants.

[fol. 50] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 72

CLOVERLEAF BUTTER COMPANY, a Corporation, Plaintiff,

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al., Defendants

DECREE—Filed July 23, 1940

On the 18th day of July, 1940, this Court after a hearing, made an order overruling the motion of the defendants to dismiss the action and set the case for further hearing at a later date.

The Court has been requested to reconsider its ruling. The defendant insist that the decree of July 18, 1940, overruling their motion to dismiss the action, was laid in error and that said decree should now be vacated and a decree rendered granting their motion to dismiss the action.

On further consideration, the Court is of the opinion that Congress has entered the field of inspecting and regulating the packing stock butter in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter sold in interstate commerce in connection with the enforcement of the internal revenue laws.

The plaintiff contends Congress has pre-empted said field to the exclusion of the power of the State of Alabama. The defendants contend otherwise. The parties have entered into a written stipulation, and it is apparent the chief difference between the parties is whether Congress has pre-

empted the field of inspecting and regulating packing stock [fol. 51] butter in interstate commerce, to the exclusion of the power of the State of Alabama.

The Court is of the opinion that Congress has not attempted to pre-empt said field to the extent of excluding the State of Alabama from inspecting the raw material known as packing stock butter in interstate commerce, used by the plaintiff in manufacturing process or renovated butter in Alabama, to be sold in interstate commerce.

The Court is of the opinion that the State of Alabama, through its duly authorized officers, may inspect the raw material known as packing stock butter, even though said raw material is in interstate commerce and is used by the plaintiff in the manufacture of process or renovated butter to be sold in interstate commerce; and if, on inspection, said packing stock butter violates any law of the State of Alabama, the same may be seized by the State of Alabama and suspended or otherwise disposed of as is provided by the laws of said State.

The Court is therefore of the opinion that the decree dated the 18th day of July, 1940, be vacated; that the motion of the defendants to dismiss the action should be granted and the action should be dismissed. In conformity with that opinion the following decree will be enrolled:

This cause coming on to be heard was submitted for decree upon the motion of the defendants to vacate and set aside the decree made and entered in this cause on, to-wit, the 18th day of July, 1940, overruling the motion of the defendants to dismiss the action, and the same being heard, understood and considered by the Court, the Court is of the opinion that said motion be granted.

[fol. 52] It is therefore Ordered, Adjudged and Decreed by the Court that the decree of this Court, made and entered on the 18th day of July, 1940, overruling the motion of the defendants to dismiss the action, be and the same is hereby vacated and set aside and held for naught.

And this cause coming on to be further heard was submitted for decree upon the motion of the defendants to dismiss the action, and upon the stipulation of the parties in writing and on file, and on consideration of the same the Court is of the opinion that the motion of the defendants to dismiss the action, on the first and second grounds stated in the said motion, should be granted and the plaintiff declining to plead further;

It is therefore Ordered, Adjudged and Decreed by the Court that the motion of the defendants to dismiss the action on the aforesaid first and second grounds stated in the motion, be and the same is hereby granted and that the action be and the same is hereby dismissed.

Plaintiff is allowed an exception to the ruling of the Court in granting the motion of the defendants to dismiss the action, and to the ruling of the Court in dismissing the action.

It is further Ordered, Adjudged and Decreed by the Court that the defendants have and recover of the plaintiff their costs in this behalf expended, for which let execution issue as provided by law in such cases.

This, the 23rd day of July, 1940.

C. B. Kennamer, United States District Judge.

[fol. 53] In the District Court of the United States for the Middle District of Alabama, Northern Division

[Title omitted]

Petition for Appeal—Filed July 23, 1940

To the Honorable C. B. Kennamer, Judge of the United States District Court, Northern Division of Middle District of Alabama:

Cloverleaf Butter Company, your Petitioner, who is Plaintiff in the above entitled cause, prays that it may be permitted to take an appeal from the decree entered in the above cause on the 23rd day of July, 1940, to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors which are filed herewith. And your Petitioner desires that the amount of security may be fixed by the order allowing the appeal.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith,
Attorneys for Cloverleaf Butter Company, a Corporation.

All of Birmingham, Ala.

In United States District Court

Order Allowing Appeal—Filed July 23, 1940

The petition of the plaintiff in the above entitled cause for an appeal from the final decree rendered in said cause

[fol. 54] on the 23rd day of July, 1940, is hereby granted and an appeal is allowed upon Petitioner filing a bond in the sum of $250.00, with sufficient sureties, conditioned as required by law and approved by the Clerk of this Court.

This, the 23rd day of July, 1940.

C. B. Kennamer, United States District Judge.

Service accepted and further notice waived.
July 23, 1940.

C. L. Rowe, Asst. Attorney General, Of Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 23, 1940

Now comes the Cloverleaf Butter Company, the Appellant in the above entitled cause, and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the final decree of this Court, entered on the 23rd day of July, 1940:

First Assignment of Error

The Court erred in granting the motion of the Appellees (the defendants in the Court below) to dismiss the action.

[fol. 55] Second Assignment of Error

The Court erred in dismissing the action, and in the rendition of the final decree made and entered in said cause.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith, Attorneys for Cloverleaf Butter Company, a Corporation.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed July 23, 1940

Now comes the plaintiff, Cloverleaf Butter Company, a corporation, appellant and hereby designates record for appeal in said cause:

1. Original bill and exhibit thereto.
2. Motion of defendants to dismiss said bill.

2½. Decree of Court of July 18, 1940.
3. Stipulation of parties in said cause filed.
4. Opinion and final decree of said Court dismissing said bill:
5. Prayer for appeal.
6. Appellant's assignments of error.
[fol. 56] 7. Order allowing appeal.
8. Appeal bond to Circuit Court of Appeals.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith,
As Attorneys for Appellant.

The undersigned as attorneys for appellee in said cause waive notice of designation of record and consents to the designation by appellant as herein stipulated as constituting the entire record material on appeal in said cause.

This the 23 day of July, 1940.

Thomas S. Lawson, C. L. Rowe, As Attorneys for Appellee.

[File endorsement omitted.]

[fol. 57] Cost Bond on Appeal for $250.00 approved and filed July 25, 1940 omitted in printing.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 23rd, 1940

No. 9647

CLOVERLEAF BUTTER COMPANY,

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al.

On this day this cause was called, and, after argument by Horace C. Wilkinson, Esq., and Erle Pettus, Esq., for appellant, and C. L. Rowe, Esq., Assistant Attorney General of Alabama, for appellees, was submitted to the Court.

[fol. 60] OPINION OF THE COURT AND DISSENTING OPINION THERETO OF HONORABLE RUFUS E. FOSTER, U. S. CIRCUIT JUDGE—Filed December 14, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9647

CLOVERLEAF BUTTER COMPANY, Appellant,

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al., Appellees

Appeal from the District Court of the United States for the Middle District of Alabama

(December 14, 1940)

Before Foster, Hutcheson, and Holmes, Circuit Judges

HUTCHESON, Circuit Judge:

Plaintiff is an Alabama Corporation engaged in Alabama under United States license, in the business of manufacturing for sale and selling in Inter and Intrastate Commerce, processed or renovated butter. Defendants are officers of the Department of Agriculture of the state of Alabama,

[fol. 61] and citizens of that state. The suit, invoking federal jurisdiction upon the ground that more than $8,000 is involved, and a right arising under a federal statute is being violated, was against defendants to restrain them from seizing or suspending from use, country or packing stock butter moving in Interstate Commerce into Alabama and into plaintiff's plant for renovating and processing there.

The claim was that by the Congressional enactments [1] relating to processing or renovating butter and the regulations [2] promulgated pursuant thereto, Congress has preempted the field of manufacture of processed or renovated

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[1] Act, May 19, 1902, Chapter 784, 32 Statutes 193, as amended, Title 26, Chap. 16, Secs. 2320, 2321, 2322, 2323, 2324, 2325, 2326 and 2327. Particular reliance is on Section 2325. "The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in courts of exportation or shipment he shall have power to confiscate the same. 53 Stat. 254."

[2] Bulletin known as Regulations No. 9,' revised April, 1936 and again revised December 24, 1936, in a bulletin titled, "Regulations for carrying into effect the process or renovated butter act." Particularly relied on of these regulations is Bulletin (d) of Article 30, page 74, Regulations No. 9: "(d) Deleterious products seizable.—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated."

butter in Interstate Commerce and of inspection and regulation of packing stock butter for use in such manufacture, to the exclusion of the state of Alabama, its officers and agencies. It was alleged that the raw material called country and packing stock butter from which the finished product is processed for sale, is bought in Interstate Commerce as well as in the state of Alabama and none of it is being [fol. 62] held or offered for sale in Alabama; that of the finished product called processed or renovated butter, approximately 90% is sold outside of Alabama; that since 1902, the federal government has fully and completely occupied and preempted the field of sanitary regulations of both the raw materials and finished product as well as the plant and industry; but that, notwithstanding all of this, defendants, as state officers, purportedly acting under the authority of state laws, but in fact acting beyond them, have recently entered into and sought to occupy the field of inspection and regulation of country and packing stock butter already preempted by the United States by attempting to duplicate the work required of the federal agencies and to exercise a kind of dual and, in some respects, exclusive control of the industry; that they have seized and suspended from use large quantities of country or packing stock butter moving in Interstate Commerce, and in addition, by contacting small producers in Alabama, some of plaintiff's sources of raw material, have intimidated them from selling to plaintiff; that the statutes of Alabama under color of which defendants are purporting to act, do not authorize the seizure of packing stock or country butter moving in Interstate Commerce to plaintiff's plant, they merely make it unlawful for any person within the state to manufacture for sale therein, have in his possession with intent to sell, offer or expose for sale, sell or deliver, any article of food or drugs which is adulterated or misbranded. Upon these and the further allegations that, unless restrained, defendants will continue their unlawful course of conduct to plaintiff's irreparable injury, an injunction was prayed.

It will be noted that it is not claimed that the state statutes are unconstitutional. It is, in fact, insisted that they are not, that they are limited to Intrastate Commerce and impose no restrictions which interfere with those fixed by Congress for Interstate Commerce. But the claim is that [fol. 63] the system of inspection provided by the federal government exempts plaintiff and its products from state

inspection and that state inspection in the face of such exemption is a violation of a federal right. Defendants moved to dismiss and there was a stipulation [3] intended to narrow;

[3] The parties to this cause stipulate and agree that the legal questions in dispute between the parties are:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean "procured, transported, handled, or sold as alleged in the complaint", as the context may indicate.

and in fact narrowing, the legal questions in dispute. The District Judge saying: "The plaintiff contends Congress has preempted the field of inspecting and regulating packing stock and butter * * * the defendants contend otherwise, * * *, the chief difference between the parties is whether Congress has preempted the field of inspection and regulation of packing stock butter in Interstate Commerce to the exclusion of the power of the state of Alabama"; and, "that the state of Alabama through its duly authorized [fol. 64] officers may inspect the raw material known as packing stock butter, even though said raw material is in Interstate Commerce and is used by the plaintiff in the manufacture of processed or renovated butter to be sold in Interstate Commerce, and if upon inspection said packing stock butter violates any law of the state of Alabama, the same may be disposed of as provided by laws of said state.", held against plaintiff and with defendants.

Thus, there was sharply presented and decided in the court below, and there is as sharply presented for decision here, the question whether this is one of those cases in which the exercise of state police power, otherwise existing and exercisable, is prevented, not by direct congressional provision that it shall not be exercised, but by implication, from the comprehensive nature of federal statutes and regulations, that Congress has completely entered and preempted a field of regulation, and intends to exclude and has excluded the state from it.

Appellees, in limine, question our jurisdiction, insisting: (1) that the attack was upon the constitutionality of a statute and the district judge as a single judge, was without jurisdiction of the case, so that no appeal lies to this court from his decision; (2) that no substantial federal question was presented and there was no federal jurisdiction, and (3) that the suit is one against the state of Alabama and as such is forbidden by the 11th Amendment.

We reject these contentions as wholly without merit. The suit was not one for three judges. It did not attack the constitutionality of the Alabama statutes, it affirmed their constitutionality. It was not a suit against the state but one within the recognized federal jurisdiction against persons purporting to act as officers of a state and, as such, to deprive citizens of rights granted them by the federal con- [fol. 65] stitution and laws. Nor can it be said of it that it did not seriously present a substantial federal question.

For, if appellant is right in its contention that the federal statutes and regulations have completely occupied the field, so as to exclude the state of Alabama from the exercise of its police powers, with regard to the inspection and seizure for condemnation of country and packing stock butter, the actions of defendants under purported state authority, would be clearly in violation of a federal right and enjoinable as such.

We agree with the appellees however, that the district judge was right in denying the relief prayed and dismissing the bill as without merit. For, in our opinion, nothing in the act or regulations under it, expressly purports to prevent, or impliedly purports to exclude the state from making and enforcing like regulations with those the United States lays down, for the purity and wholesomeness of ingredients to be used in the process of manufacturing food products in Alabama for sale there and in other states.

Nothing in the act, the regulations, or the practices under the act, purport to expressly grant to plaintiff immunity from state seizure of food products which in the opinion of state officers, are filthy or deleterious in violation of Alabama laws. It must be admitted that the state of the authorities is such that there is much confusion to the casual and no little to the careful reader of them, as to when there is and when there is not such conflict between state and federal regulations of the same subject matter as to exclude the state from the field. This confusion is grounded in and springs in part from, the failure of some of the opinions to clearly apprehend and point out the differentiating facts in each situation. Particularly is it grounded in the failure to draw clearly enough the distinction between those cases [fol. 66] where a complainant, subject to federal regulation of some kind, is attempting to magnify and enlarge the actual scope of the federal law, to use it as a shield against, or a cat's-paw to draw his chestnuts from the fire as to state regulations, and those where, confronted with positively inconsistent and conflicting state and federal laws, and ordered, but unable, to comply with both, complainant, because of that inability, invokes, as paramount, the protection of the federal laws. But wanting in clearness as they are, nothing in any of the authorities lends support to the view that merely because Congress has taken cognizance of the business of making and shipping renovated or processed butter in Interstate Commerce, and has provided regula-

tions for such making and shipment, a state in which the manufacturing plant is situated and in which part the product is sold, may not make and enforce regulations not inconsistent with those of the Congress to insure the purity of the product so manufactured.

Here the imagined conflict between state and federal authorities lies only in the fact that the federal authorities have failed to seize and condemn particular lots of butter which the state has found seizable. There is no complaint on the part of the federal authorities of any interference with them by the authorities of the state. It is not claimed that the state is imposing any higher or other standards than the federal government imposes, indeed it is admitted that it is not. The sole claim is that in enforcing these non-conflicting standards the state has actually seized for condemnation, packing stock which United States inspectors have not so seized. The claim in short is, that the fact of its non-seizure by the federal inspectors is in effect, a certificate or finding that the articles are non-seizable, and therefore immune for state seizure.

We do not think that this will at all do. In the first place, in enacting the statute and regulations in question, the fed- [fol. 67] eral government was not concerned with interfering nor at all attempting to interfere, with any of the states in the matter of regulating the purity of this kind of product. The act is captioned: "An act to make oleomargerine and other imitation dairy products subject to the laws of any state or territory or the District of Columbia into which they are transported." In the first section of the act it is provided "all articles known as * * * processed, renovated * * * butter * * * transported into any state or territory or the District of Columbia and remaining therein for use, consumption, sale or storage, shall upon the arrival within the limits of such state or territory, be subject to the operation of the laws in such state or territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such state or territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Now it is true that this section does not in terms refer to the ingredients, such as packing stock or country butter, from which the processed or renovated butter is manufac-

tured. But we would, we think, be blind to both the purpose and purport of the statute, if we implied from it that the Congress, which had declared that the finished product when introduced into a state would be subject to the laws of that state, intended by the act to exclude the state of manufacture from the regulation of the ingredients used in the manufacture with the result that persons might set up as manufacturers in particular states under the protection of Congress and then import into them and use in the manufacture of food products therein, impure or unfit products, free from inspection by and regulations of, the state, designed to prevent such importation and use. On the record before us, the complaint is not as to the manner of exercise, it is [fol. 68] as to the existence of the power. No complaint is made that the action of the state as to the particular products seized was unwarranted, capricious or unjust. Indeed, if the power to seize exists, no such complaint could be made, for the procedure provided for by the state act makes full provision for a hearing and permits the owner to fully contest the grounds of seizure. Thus, boiled down to its ultimate, the contention of the appellant comes only to this; that because and only because, Congress has enacted laws and authorized regulations under which appellant has been licensed to and has set up a manufacturing establishment in Alabama, it must be implied that it intended to authorize appellant to bring to its manufacturing establishment in that state for use in processing, completely free from inspection and seizure by the state, any kind of packing house or country butter it pleases. That in short, this conclusion must be drawn because, and only because the federal government has adopted acts and regulations under which it may inspect and seize and confiscate such products in the interest of the public health and safety.

It is not claimed that the state is attempting to seize renovated or processed butter after all the processes of manufacture have ceased and its movement in Interstate Commerce has begun.

All that the state is purporting to interfere with here is raw material, brought into and gathered in the state for use in a state plant, in the manufacture in the state of an article of commerce, which when manufactured goes both into Interstate and Intrastate Commerce, and does so in such condition that it is then impossible for the state or the

government to detect in it the impurities existing and obvious in the packing stock.

The authorities on which appellant relies are all, we think, when understood in the light of later authorities, clearly [fol. 69] distinguishable from this case. Without the aid of, Mintz v. Baldwin, 289 U. S. 346; Pacific States Co. v. White, 296 U. S. 476; Kelley v. Washington, 302 U. S. 1; S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177; Townsend v. Yoeman, 301 U. S. 454; Currin v. Wallace, 306 U. S. 1; the cases of Oregon-Washington R. R. Co. v. Washington, 270 U. S. 87 and Napier v. Atlantic Coastline Co., 272 U. S. 606, on which plaintiff strongly relies, might give us some difficulty. When we read in Mintz v. Baldwin, "the purpose of Congress to supersede or exclude state action against the ravages of disease, is not lightly to be inferred. The intention so to do must definitely and clearly appear," and to the same effect in the other late cases, we get our bearings and stand on firm ground again. The cases on which appellees rely are nearer in point. They establish the doctrine that state officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar federal laws and regulations in respect to the same subject matter and there has been no federal seizure.

Relief from the enforcement of state police regulations upon the claim that federal regulations have preempted the field, requires much more to be shown. It must appear that there is in effect an express prohibition against state regulation or that there is such an essential conflict between state and federal laws and regulations as that compliance with the one is defiance of the other and therefore, a prohibition against state regulations must be implied. No such case is made here. It is not claimed that the state and federal standards are in conflict. It is not even claimed that the federal government has actually inspected and passed the particular products the state has seized. The claim is merely that because the federal government has the right to inspect, seize and condemn, complainant has a federal [fol. 70] right to exemption from state government inspection and seizure. We do not think so. The district judge was right in finding and adjudging that there was no equity in complainant's bill. His judgment is

Affirmed.

FOSTER, Circuit Judge, dissenting:

I disagree with the conclusions of the majority in this case for the following reasons:

In addition to other allegations referred to in the majority opinion, the bill alleges that between the 17th day of April, 1939 and the 22nd day of June, 1940, on sixteen separate occasions the state officers seized a total of 20,924 pounds of packing stock butter, which originated in whole or in part in states outside of Alabama, which had been delivered to plaintiffs' plant at Birmingham as raw material and was not being sold, offered or exposed for sale, or admitted for sale in its then condition but was being held by plaintiffs solely and exclusively for the manufacture of renovated butter in the usual course of business. The Alabama officers were acting under authority of the Alabama Agricultural Code. In State vs. Cecil, 216 Ala. 391, it was held the enactment of the Agricultural Code was within the exercise of the police power of the state but the operation of the code was confined to intrastate commerce. Conceding that the Alabama regulations are practically the same as the Federal regulations I consider that Congress has preempted and completely occupied the field as to the manufacture of processed butter for sale and shipment in interstate commerce. The law of Alabama, enforced by state officers, should not be permitted to inter- [fol. 71] fere with the Federal Statute and regulations in respect to shipments in interstate commerce. The bill was dismissed on motion without a trial on the merits. Of course, appellant would have a remedy at law to test the validity of each seizure but where seizures have been so frequent, and no doubt will continue, if appellant operates its plant, the remedy at law would not be so complete and adequate as to oust jurisdiction in equity. I consider the judgment of the District Court should be reversed and the case remanded.

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[fol. 72] JUDGMENT

Extract from the Minutes of December 14th, 1940

No. 9647

CLOVERLEAF BUTTER COMPANY

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama; and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Cloverleaf Butter Company, and the surety on the appeal bond herein, Commercial Casualty Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Foster, Circuit Judge, dissents."

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[fol. 76] ORDER DENYING REHEARING

Extract from the Minutes of January 14th, 1941

No. 9647

CLOVERLEAF BUTTER COMPANY

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.
"Foster, Circuit Judge, dissents."

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

Number 9647

CLOVERLEAF BUTTER COMPANY, Appellant,

vs.

HAYGOOD PATTERSON, et al., Appellees

MOTION AND ORDER STAYING MANDATE—Filed January 22nd, 1941

Now comes said appellant by its attorneys and by leave of Court hereby moves the Court to stay the issuance of a mandate in said cause pending appellant's petition or application for certiorari To The Supreme Court of The United States and pending decision of said Supreme Court.

Appellant respectfully represents to the Court that the withholding or staying of said mandate as herein moved for will not prejudice appellees in this cause.

(Signed) Horace C. Wilkinson, Erle Pettus, and Victor H. Smith, as Attorneys for the Appellant.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9647

CLOVERLEAF BUTTER COMPANY, Appellant,

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al., Appellees

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of January, 1941.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 7, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,130. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 781. Cloverleaf Butter Company, Petitioner, vs. Haygood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, et al. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1941. Term No. 781 O. T. 1940.

(4255)